Marquette Law Review

Volume 14
Issue 4 *June 1930*

Article 10

Landlord and Tenant: Rental of Premises While Padlocked

Charles L. Larson

sistent in treating this as reversible error." *Ducate* v. *Brighton,* 133 Wis. 628, 637, 114 N.W. 103.

Variance from the rule expressed in the above cases appears in *Ketchum* v. *Chgo. etc. R. Co.,* 150 Wis., 211, 136 N.W. 634, where jurors requested and obtained from the attending court officer, not the judge, the measurements of certain railroad cars, the action being denounced as improper, but being regarded as having had no effect upon the verdict, especially in view of Section 274.37 Wis. Stat., which requires an affirmative showing that error affected substantial rights of the appellant. The statute referred to provided in part that no judgment shall be reversed or set aside or new trial granted for any error as to procedure unless the error complained of has affected *substantial* rights of the party complaining. The retreat thereby marked from the strict rule above exemplified met with dissent by Justice Timlin, who feared the case as precedent and favored the granting of a new trial due to the misconduct of the jury. *Ketchum* v. *R. Co.,* 150 Wis. 211, at pp. 220-222, 136 N.W. 634; see also *Sedlack* v. *State,* 141 Wis. 589, 592, 124 N.W. 510.

In cases involving communications of this kind, it is important that distinction be made between communications had by the court with the jury, and communications had by the jury with someone other than the judge. The latter circumstance is open to interpretation as to whether it constitutes "court procedure" within the meaning of the statute; and on that basis the cases of *Ketchum* v. *R. Co.* and *Sedlack* v. *State* may show a seeming rather than a real deviation from the ruling in *Havenor* v. *State* and the cases cited therewith. At any rate, the instant case, *Hackbarth* v. *State,* is a noteworthy departure in that where the evidence as to guilt is strong, and backed by the defendant's own admissions, it will outweigh a claim of prejudicial error.

RONALD A. PADWAY

Landlord and Tenant: Rental of Premises While Padlocked.

The plaintiffs in this action brought suit for the recovery of rent. Two separate leases involving different properties are the contracts sued on, and are considered in separate actions, both of which are herein discussed. *Rundle-Spence Mfg. Co.* v. *Jakopichek,* Wis., 229 N.W. 550.

Defendant entered in a written lease for the premises known as No. 86 Second street, beginning July 1, 1924, and ending June 30, 1927, by the terms of which lease he was to pay an annual rental of $1,200.

Jakopichek subleased the premises to Ignatz Pitzer and Leo Braun for the entire period for a consideration amounting to $1,200 over and

above that stipulated as the amount due from the defendant Jakopichek to Rundle-Spence & Co.

According to the terms of the lease the premises were to be used for restaurant purposes and as a refreshment parlor. The rent was paid on time until Nov. 11, 1925, when the premises were padlocked by order of the United States District Court for the Eastern District of Wisconsin for the sale of intoxicating liquors an said premises by the sub-lessees, Pitzer and Braun; and a permanent injunction was issued out of said court, restraining and enjoining the plaintiffs and others, their agents, servants, and assigns from keeping, using or occupying said premises for a period of one year. That rent due during the padlock injunction is sued for, the defendant entering as a defense knowledge by the plaintiff of the violation of the law or at least of an intent so to do when the lease was entered into. A cross complaint was served upon defendants, Pitzer and Braun, by defendant Jackopichek. The trial court held that Rundle-Spence & Co. could recover nothing from any of the defendants and Jackopichek's cross complaint was dismissed.

The other lease related to the premises known as No. 70 West Water Street, and the amount of the rental for the first year was $1,620 and for the second and third years was $1,740. The defendant subleased the premises to one Haslacher on Feb. 9, 1924, for a consideration of $1,700 over and above the rental reserved in the lease from the plaintiff to Jakopichek. The padlocking took place on March 30, 1926, and judgment was the same as in the first case, from which the plaintiff appeals.

In the finding of the Supreme Court it was established that in each case the sub-lessees had occupied the premises previous to the leases from Jakopichek, under subleases from the Waukesha Brewing Co., and also that the sub-lessees had been previously convicted of offenses against the laws relating to the sale of intoxicating liquors.

A careful search of the record reveals nothing which would support a finding that at the time the lease was entered into, it was contemplated by the plaintiff that a violation of prohibition law would occur. Each lease contained the following clause, "Said lessee to use said premises for refreshment parlors, to be operated in a peaceable and quiet manner, and if the premises are used for anything else, lease will be subject to cancellation by the lessor." There is no evidence to show that the plaintiff in any way participated in illegal ventures of the defendant. The rent was fair and reasonable, the plaintiff sharing in no way any increased rent in the profit of the illicit sales made by the defendant sub-lessees. If a finding that the plaintiff participated in any way in the illegal enterprises could be sustained in this case,

such a finding would have to be sustained in every case where a landlord had grounds which would support a suspicion that his tenant might engage in an illegal enterprise on the premises. A landlord cannot be obliged to act on the supposition that every restaurant or refreshment parlor is engaged in the illegal sale of intoxicating liquors as a matter of fact. In the case of *Harbison* v. *Shirley,* 139 Iowa 605, 117 N.W. 963, 19 L.R.A. (N.S.) 662, it is held that a mere suspicion by the landlord that there is or may be an offence committed is not sufficient to defeat his right. There must be some form of connivance, however slight, to render a contract void. Mere indifference as to the intended use is not enough; his relation to the unlawful purposes must be active in some degree, and until such connivance is shown, the lessee will be held to the contract *Tracy* v. *Tolmadge,* 14 N.Y. 162; *Chamberlain* v. *Fischer,* 117 Mich. 428; *Anheuser-Busch Brewing Co.* v. *Mason,* 44 Minn. 318; 9 L.R.A. 506; 46 N.W. 558.

Jakopichek, prior to entering into the real estate business in 1922, had been a saloon keeper and had been convicted of a violation of the prohibition law; he had intervened in the transaction in order to procure the lease from the plaintiff in the first instance, and quite clearly took advantage of the situation so as to compel his sub-lessees to pay a large amount for continued possession of the premises which he no doubt contemplated that they would do because of the illicit business which they might transact upon the premises. Clearly there is no other way in which the large amount they were compelled to pay him above the normal rental could be accounted for. The plaintiff did not in any way participate in the transaction except to agree that the sub-lessees might pay the rent directly to them.

The judgement in each case denying the plaintiff's right to recover is reversed and the cause remanded to the trial court with directions to enter judgment against defendant Jakopichek for the amount due under the leases. The judgment dismissing the cross complaint of defendant Jakopichek is affirmed.

CHARLES L. LARSON

Workmen's Compensation Act: Liability of Co-employees.

Third Parties—Plaintiff accepted compensation under Workmen's Compensation Act for the death of her husband, which was occasioned by a co-employee's negligence, and after being assigned the employer's rights, sued the tort feasor.— *Held:* The acceptance of the award was no bar to the action. *McGonigle* v. *Gryphan, Wis.,* 229 N.W. 83.

The defendant is liable unless the relation of fellow workman or a provision of the act exempts him. 18 *R.C.L.* 540. By the weight of